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I. The Gap Between Law and Moral Order

A. "The Gap"

During the Law Teachers Seminar on Law, Society, and Moral Order at Syracuse University in 1979, Professor Richard Schwartz presented a graphic image of "the gap" that may exist between law and moral order in society. He suggested that a circle can be drawn to represent the moral order of a given society. Another circle can be drawn to represent the law of that same society. Sometimes, or at least regarding some issues, the two circles will overlap substantially. At other times, or regarding other issues, they will be totally disconnected with a gap between them. (See Figure 1.) This is "the gap."

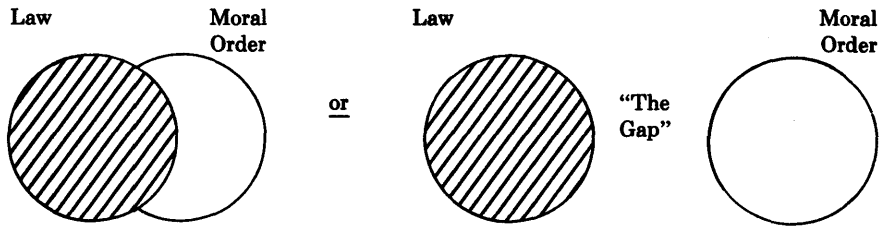

Figure 1

This graphic representation of the relationship between law and moral order has certain shortcomings. To begin with, the concepts of "moral order" and "law" are difficult to describe

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precisely. The term "moral order" refers to the core values and fundamental beliefs which comprise the basic mores of a particular society at a particular time; it is a positive morality as distinct from the critical morality of philosophers.[1] The term "law" refers to positive law; the regulations of social behavior that are created and enforced by the government. But, "moral order" in modern society is so complex, so protean, and so eclectic that a static, two-dimensional representation obviously cannot adequately represent it for all purposes. Likewise, it is simplistic to represent "the law" with a precise geometric figure when our legal system is characterized by such amorphous variables as federalism, prosecutorial discretion, jury trial, and the common law process. And, of course, it is extremely difficult to gauge the relative positions of these two planets in the universe of positive morality.

Notwithstanding these limitations, this diagram of "the gap" is an effective way to illustrate the following basic premises concerning the role of law in modern society.

1) There is a moral order in society.[2] Out of the many different and often conflicting values of the individuals and institutions that make up society may emerge a dominant moral position, a "core" of the moral order. The position of this core is dynamic, and as it changes the moral order of society moves in the direction of that change.[3]

2) There is a moral content to the law.[4] The moral content of law also changes over time, and as it changes the law moves in the direction of that change.[5]

3) The moral content of the law and moral order in society are seldom identical.[6]

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1. The terms "positive morality" and "critical morality" were used by Professor Jeffrey Murphy, a participant in the A.S.U. Symposium, to distinguish between the social mores which are the subject matter of Professor Schwartz's "moral order" and the more reflective type of morality with which Professor Murphy and other philosophers are primarily concerned.

2. *See* Diamond, *The Rule of Law Versus the Order of Custom*, 38 SOC. RESEARCH 42 (1971); Schwartz, *Moral Order and Society of Law: Trends, Problems, and Prospects*, 4 ANN. REV. SOC. 577 (1978); *See also* K. LLEWELLYN, THE BRAMBLE BUSH 107-18 (1960).

3. *See, e.g.*, E. LEVI, AN INTRODUCTION TO LEGAL REASONING 56 (1948).

4. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

5. A. NORTH, THE SUPREME COURT: JUDICIAL PROCESS AND JUDICIAL POLITICS 169 (1966).

6. *See* Bohannan, *The Differing Realms of the Law*, 67 AM. ANTHROPOLOGY pt. 2, at 33, 37 (1965).

4) A natural and necessary affinity exists between the two "bodies" of law and moral order.[7]

5) When there is a gap between the moral order of society and the law, some movement to close the gap is likely.[8] (The law will move closer to the moral order of society, or the moral order will move closer to the law, or each will move toward the other.) The likelihood of movement to close the gap between law and moral order depends upon the size of the gap between the two bodies and the perceived significance of the subject matter concerning which the gap exists.[9]

B. Legitimacy

Our discussions at the Law Teachers Seminar regarding "the gap" stimulated my interest in the legitimacy of law and of our legal order system in modern society. The term "legitimacy" is used here to mean accepted or sanctioned by society; within the limits of the social system. Thus, law is "legitimate" only if "the gap" is not too great.

In a democracy, law must be within the field of gravity of the moral order of society to be legitimate; there are limits on the size of the gap that a democracy can tolerate. The power of the law and legal institutions to function effectively in a democracy depends, ultimately, upon the allegiance of the citizen-subjects. The justice system is capable of responding to the disobedience of only a small number of citizens to specific laws. Thus, the respect and loyalty of society-at-large are essential to the legitimacy of law and of the legal order system.

When the gap between any law and the moral order concerning the subject matter of that law becomes too great, there is danger that that law will lose its legitimacy. There is also the danger, at least in a democracy, that the legal system will lose its legitimacy. And when the gap is caused by the judiciary, there is great danger that the judiciary will lose its legitimacy.

C. Judicial Activism

The action of judges which changes the moral position of the law so as to create or close a significant gap between law and

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7. *See* Schwartz, *supra* note 2, at 589.

8. *See* Walster, Bershheid, & Walster, *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCH. 151 (1973).

9. *See* J. COHEN, R. ROBSON, & A. BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW 195, 198 (1958).

moral order in society is referred to as judicial activism. (This paper focuses on gap-creating judicial activism.)

In our constitutional system of checks and balances, the functions performed by the judiciary are unquestionably crucial even if they are at times ambiguous. (The preservation of the balancing process that prevents the political branches of government from consuming each other, and democracy as well, certainly is one of them.[10]) Yet the American judiciary, historically, and the federal judiciary, constitutionally, are "independent" and politically unresponsive. Thus, although the dangers of judicial activism to the legitimacy of the law, the courts, and the legal order system are relatively clear, the appropriate limits on the activist role of the judiciary are not.

Traditionally, the judiciary has been the least active governmental agent of social change. When the United States Constitution was proposed, its supporters argued that the judiciary would be "the least dangerous" branch of the federal government.[11] And historically the American judiciary has been a classically conservative social force—a preserver and protector of the traditional, the established, and the status quo. Thus, the judiciary has been an evolutionary, rather than a revolutionary, institution.[12]

But following the Civil War, during the Radical Republican Era of federal expansionism, the American judiciary assumed a more active policy-forming role than it previously had taken. Between 1890 and 1934, the United States Supreme Court invalidated literally hundreds of progressive economic and social regulations in pursuit of "economic due process," and some state supreme courts were even more aggressive.[13] Although such judicial activism has often been condemned by scholars and judges, such criticisms have more frequently been indicative of the critics' dislike of the social policies effectuated rather than any consistent concern over the expanded social-policy-shaping role assumed by the judiciary.[14]

An activist role for the judiciary now appears to be firmly

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10. *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980).

11. THE FEDERALIST No. 78 (A. Hamilton).

12. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); S. SCHEINGOLD, THE POLITICS OF RIGHTS (1974); Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1 (1977).

13. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 738 (1975).

14. *See* A. BICKEL, *supra* note 12, at 45-46; Ely, *The Supreme Court 1977 Term*, 92 HARV. L. REV. 5, 15-16 (1978).

entrenched in our legal and political traditions. Yet there are still ways in which discontent with judicial activism may surface. The legitimacy of the institutions of the law may be subverted if the legitimacy of the law created by judicial activism is in doubt. And since this form of opposition is more subtle than direct attack on the role of the judiciary, it may prove to constitute the more serious challenge to the dynamic interaction of the law and moral order that is the foundation for our democratic society.

The judiciary unquestionably performs an essential role in our democratic society. Therefore, if the legitimacy of the judiciary as an institution may be threatened when judicial activism creates an intolerable gap between the law and the moral order of society, then certainly this is a matter for serious study. In the remainder of this paper I will examine the legitimacy of judicial activism in the context of the relationship between the law and the moral order. I will first propose a framework of analysis for determining when a judicially created gap is too great; I will suggest three tolerance limits on legitimate judicial activism. Secondly, I will apply that framework of analysis to one of the most controversial subjects of recent judicial activism, the doctrine of abortion privacy; I will test my model to see whether it can provide any useful perspectives about the legitimacy of the abortion decisions.

II. The Limits of Legitimate Judicial Activism

The most significant challenges to the legitimacy of court-initiated change in the law relate to three issues: (1) Whether the new law is supported by an active and influential group within the society; (2) whether the action of the court is perceived by the other branches of government as threatening their own authority; and (3) whether the articulated justification for the court's decision is credible.[15] These three questions roughly identify the tolerance limits for judicial activism.

A. Is The New Law Supported By An Active And Influential Group Within Society?

The first inquiry asks whether or not the new law comes within the "field of gravity" produced by the core moral order of

15. *See* Schwartz, *supra* note 2, at 578. My three criteria roughly correspond to the three factors identified by Professor Schwartz as contributing to the acceptance of legal norms by society.

society. Is there some active and influential group that can effectively offset any pressure that otherwise might be generated by reversionary groups to resist the law-change or to pull the law back in the direction of the existing moral order? If not, the new law tends to be illegitimate.

Professor Schwartz indirectly suggested this limit on the legitimacy of judicial activism when he stated: "Instead of reflecting a general value concensus, law often implements the value preferences of small groups who are either strategically placed within the system or are able to bring power to bear from without."[16] The same idea is also suggested by Stanley Diamond's comments about the "structural opportunism" of early state lawmaking authorities in deigning to "permit" in law what they could not prohibit.[17] He noted that early governmental systems were able to grow in power by making strategically advantageous alliances as conflicts arose which divided political society internally.[18]

The need for law to be accepted by an influential group in society in order to be legitimate is one of the primary assumptions that underlies Stuart Scheingold's work, *The Politics of Rights*.[19] In his chapters dealing with "Rights as Resources" and "Legal Rights and Political Mobilization," he stresses the idea that court-initiated law changes do not have significant force to effect social change, but are important in stimulating responsive groups within society to take political action to effectuate social change.[20] Scheingold emphasizes that judicial decisions alone are not persuasive "to the elites who are most immediately responsible for making decisions for the polity. These elites are, however, likely to respond to effectively organized interests, and legal symbols can be usefully employed in behalf of political mobilization."[21] Accordingly, gap-producing judicial decisions must be supported by a politically active group to prevent other mobilized groups, whose interests are negatively affected by the decisions, from overturning the law changes.

Thus, even though judges are not themselves politically responsive, our legal order is. Law in a democracy must represent

16. Schwartz, *supra* note 2, at 577-78. *See also id.* at 580, 581.
17. *See* Diamond, *supra* note 2, at 48-50.
18. *Id.* at 62-64.
19. S. SCHNEINGOLD, *supra* note 12.
20. *See id.* at 83-96, 131-48.
21. *Id.* at 148.

the will, or at least the tolerance of society. To acquire legitimacy, then, court-initiated law changes must find support within society at large—at least enough support to offset the reactionary forces that will be mobilized to resist both the law change and its effect on moral order.[22]

B. *Is The Judicial Action Perceived By The Other Branches Of Government As Threatening Their Authority?*

In a two-tiered, tripartite system of government in which the principles of federalism and separation of powers are constitutionally established, the action of any single branch of government that produces a significant, gap-opening change of law must not be perceived by the other branches or units of government as threatening a usurpation of their authority or as representing a substantial infringment of their roles in governing society. Thus, the second limit on legitimate judicial activism concerns whether or not the judiciary has exceeded its political "jurisdiction" by making a particular change in law.

The "jurisdictional" limit on judicial activism poses a particularly delicate problem for the federal courts.[23] In cases in which controversial social legislation has been sustained, the United States Supreme Court has often emphasized that it cannot strike down duly enacted statutes simply "because they may be unwise, improvident, or out of harmony with a particular school of thought."[24]

The reasons for this limit on judicial "legislating" are many, but three in particular should be mentioned here. The first reason is that, inasmuch as a court is not a politically responsive branch of government, its "currency" of legitimate judicial activism is somewhat limited. Judicial decisions that create a gap be-

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22. Legitimacy is also, at least partially, a function of time. With the passage of time a law change acquires a presumption of legitimacy which enhances its acceptability. Thus, even if a gap-creating law change is repugnant to most active groups in society, if those to whom it is acceptable can prevent its outright rejection, the law change may acquire legitimacy over time. That is, the group supporting the law change must at least be able to neutralize reversionary interests and create an impasse—a temporary stagnation of the dynamic legitimation process. This may provide a continuing opportunity for supporters of the legal change to rally support for the movement to a new moral order, while the passage of time itself subtly enhances the legitimation of the new legal order.

23. *See generally* A. BICKEL, *supra* note 12, at 65-72, 183-97; A. NORTH, *supra* note 5, at 169.

24. Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955), *cited in* Dandridge v. Williams, 397 U.S. 471, 484 (1970).

tween law and moral order carry a high "cost" in this rare "currency." As one commentator observed: "Perennial judicial policy making arouses a dialectical progression: it eats away the expectations of neutrality that form the principal source of the courts' moral support; long-continued judicial authoritarianism will ultimately destroy itself."[25] The late Professor Lon Fuller argued that legislative functions are "parasitic" when performed by the courts because they sap the courts of their legitimacy.[26]

The second reason is that for the court to assume an active role in changing the morality institutionalized in the law duplicates the primary role of a competing branch of government, and invites contention between co-equal departments of government. Thus, former California Supreme Court Chief Justice Traynor, whose distinguished career often found him breaking new ground, warned judges against usurping the legislative function when he observed:

> [S]tudents of constitutional law will find valid grounds for difference as to how readily a court should arrive at a constitutional rule that nudges a legislature into social reform along one expansive front or another. . . . Nevertheless there remains widespread agreement that the court itself cannot be the engine of social reform. The very responsibilities of a judge as an arbiter disqualify him as a crusader.[27]

Another highly respected state supreme court chief justice echoed this sentiment when he wrote:

> To the extent that courts perform their role as expected, their decisions, even if unpopular, will have a greater chance of being accepted and followed by society. . . . *[B]y maintaining a conservative stance, the courts help to preserve the sense of security and stability society requires. The more the other two branches of government engage in the politics of change, the greater the need for a stable and predictable judicial branch.* . . .
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> . . . If the courts deviate from their expected method of decision-making and issue novel and creative decisions, the stability and security that society needs from the courts will wane.[28]

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25. Friedman, *The Courts And Social Policy*, 216 NATION 467, 469 (1973).

26. Chayes, *The Role Of The Judge In Public Law Litigation*, 89 HARV. L. REV. 1281, 1304 (1976) (citing an unpublished manuscript written by Professor Lon Fuller).

27. Traynor, *supra* note 12, at 5.

28. Cameron, *The Place For Judicial Activism On The Part Of A State's Highest*

The concern that judicial activism duplicates the role of a co-equal branch of government was well articulated by Justice Powell in his concurring opinion in *Frontiero v. Richardson*:

> There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. . . . It seems to be that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.
>
> There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.[29]

The third reason for imposing a "jurisdictional" limit on judicial activism is that by virtue of the method of selecting legislators and the legislative methods of operation, the legislature is considerably better suited for the task of determining the moral order of society and establishing it in law than is the judiciary. As Justice Marshall observed in his dissenting opinion in a recent seventh amendment case:

> Normally, in our system we leave the inevitable process of arbitrary linedrawing to the Legislative Branch, which is far better equipped to make ad hoc compromises. In the past, we have therefore given great deference to legislative decisions in cases where the line must be drawn somewhere and cannot be precisely delineated by reference to principle.[30]

In a similar vein, Chief Justice Traynor wrote: "Even at his most active, [a judge] must be alert to set limits on judicial creativity sufficient to preserve the distance between judicial analysis and legislative innovation."[31]

Court, 4 HASTINGS CONST. L.Q. 279, 282 (1977) (emphasis added).

29. 411 U.S. 677, 692 (1973).

30. Colegrove v. Battin, 413 U.S. 149, 182-83 (1973) (Marshall, J., dissenting).

31. Traynor, *supra* note 12, at 2.

Thus, judicial creation of social policy flies in the face of the basic premises of constitutional government with its preference for localized representative democracy.[32] These concerns, and others, create a competitive jurisdictional restraint on judicial activism.[33]

C. *Is The Articulated Rationale For The Judicial Action Credible?*

This factor relates solely to law changes caused by the judiciary. It focuses on the principal characteristic of the judicial decisionmaking process that distinguishes it from the legislative and executive processes. The question here is whether the legal analysis that constitutes the body of the formal judicial opinion provides a credible justification for the change in the law.

Legal analysis is a process of reasoning by analogy to established authority and accepted principles.[34] It defines the boundaries of the range of decisions which the judge can make, for all judicial decisions must ultimately be justified by legal analysis. Accordingly, if the decision of a court cannot be credibly defended by legal analysis, it has failed this standard of legitimacy.

This principle is so fundamental that it is occasionally overlooked. However, legal analysis is the essence of the judicial process, and making principled decisions that are explained credi-

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32. *See generally* Fordham, *Judicial Policy-Making At Legislative Expense*, 34 GEO. WASH. L. REV. 829 (1966).

33. The significance of this "jurisdictional" limit on the ability of courts to change law ought not to be overstated. As a practical matter, it is very difficult for Congress or the President to check judicial activism. Although Supreme Court negation of legislative and executive activism is now (175 years after *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)) an accepted tradition in this country, immediate response by the political branches to judicial activism is not as well accepted. For example, during the Watergate crisis the sitting President had the greatest of all self-interested reasons to defy the judiciary, yet he did not do so (presumably, for fear of public response). The fact that a crisis atmosphere existed for several weeks during the Watergate scandal underscores the point that direct confrontation by a political branch of government with the Court is unusual, uncomfortable, and especially undesirable.

Constitutional decisions of the Supreme Court have been overturned through the political process only four times in the entire history of the nation. *See* J. Choper, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 421 n.133 (1980). (This historical fact, however, may merely indicate that the federal judiciary has been exceptionally successful in judging how far they can go without violating this limit on their authority.) Thus, even though a strong negative reaction of the political branches of government must be a matter of concern to the federal courts, rarely has judicial activism been denied legitimacy on this basis alone.

34. *See* E. LEVI, *supra* note 3, at 1-3.

bly is the heart of the judicial function. As Professor Bickel declared, a court "can only decide the case before it, giving reasons which rise to the dignity of principle . . . ."[35] He further observed that "[w]hen it strikes down legislative policy, the Court must act rigorously on principle, else it undermines the justification for its power."[36] As Chief Justice Traynor stated: "A judge must do more than decree; he must reason every inch of the way."[37] Thus, judicial politics could be described as the politics of reason rather than of power.[38]

Professor Wechsler, in his famous dissertation on neutral principles, declared that "[t]he virtue or demerit of a judgment turns . . . entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees . . . ."[39] He stressed that:

> [a] principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive.[40]

Archibald Cox probably best summarized the underlying concern when he observed that "[t]he court's power to give its decisions the force of legitimacy ultimately depends in large measure upon its professional artistry in weaving wise statecraft into the fabric of law. . . ."[41] He also wrote:

> Court decrees draw no authority from the participation of the people. . . . It comes, to an important degree, from the continuing force of the role of law—from the belief that the major influence in judicial decisions is not fiat but principles which bind the judges as well as the litigants and which apply consistently among all men today, and also yesterday and tomorrow.[42]

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35. A. BICKEL, *supra* note 12, at 69-70.
36. *Id.*
37. Traynor, *supra* note 12, at 11.
38. S. SCHIENGOLD, *supra* note 12, at 37.
39. H. WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 27 (1961).
40. *Id.*
41. A. COX, THE WARREN COURT 48 (1968).
42. *Id.* at 21, 22.

III. The Abortion Doctrine and the Limits of Legitimacy

The contemporary abortion controversy provides an excellent subject for a trial application of my model of tolerance limits on judicial activism. Before 1973 there was no "abortion doctrine" in American constitutional law. "The law" regarding abortion consisted of the various statutes enacted by the state legislatures, and that covered a tremendous range of positions. The historic American rule had been that abortions were illegal except when necessary to save the life of the mother. However, between 1967 and 1972, responding to a popular reform movement, thirteen state legislatures revised their abortion laws to follow the liberalized abortion provisions of the proposed Model Penal Code (which allowed abortion in three exceptional situations—grave maternal health risk, felonious intercourse, and for eugenic reasons (when the child might be born with a severe mental or physical defect)). Four other states went even further and effectively allowed abortion-on-demand during part of the term of pregnancy. In the remaining American jurisdictions (approximately two-thirds of the states), abortion could be performed legally only when the mother's life (or, in some states, her health) was endangered.

In 1973, after years of growing debate in the states, the United States Supreme Court attempted to judicially resolve, once and for all, the abortion controversy for the entire country. In *Roe v. Wade*,[43] the Court announced that a fundamental right of privacy implicit in the fourteenth amendment protects the decision of pregnant women whether or not to have an abortion. The strictest standard of judicial scrutiny was held to apply to laws infringing upon this right of abortion privacy. Reasoning that unborn children are not "persons in the whole sense" and are not entitled to legal protection before viability, the Court fashioned a three-part constitutional rule regulating abortion. The effect of *Roe* was to mandate, as a matter of constitutional law, that states permit abortion-on-demand during at least the first six months of pregnancy.[44]

The effect of *Roe* and its companion case *Doe v. Bolton*[45]

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43. 410 U.S. 113 (1973).

44. For a more complete discussion of the holding and results of the 1973 abortion decisions, see L. Wardle, The Abortion Privacy Doctrine: A Compendium and Critique of Federal Court Abortion Cases (1980).

45. 410 U.S. 179 (1973).

was revolutionary. *All* existing abortion laws (including all of the recently liberalized abortion laws) were invalidated, wholly or in part.[46] Instead of resolving the dispute, however, the Court's action appears to have intensified the controversy. Much of the criticism of the *Roe* decision focuses upon its arbitrary approach and its inconsistency with current and traditional social mores.[47] Thus, the judicially created abortion doctrine presents an excellent opportunity for a contemporary case-study applying the three limits on legitimate judicial activism that have just been described.

Application of the tolerance limits on judicial activism to the abortion controversy is predicated on one important assumption. I posit that the doctrine of abortion privacy is the result of judicial activism, *i.e.*, that the abortion decisions of the Supreme Court[48] represent a gap-creating movement of the law away from the moral order of society. Undoubtedly there was some gap between pre-*Roe* abortion laws of the various states and the moral order of society (as the success of abortion law reform movement in the late 1960's and early 1970's demonstrated). But I am suggesting that *Roe* and its progeny have created a new and significantly wider gap between the law and moral order than previously existed.

A. The Abortion Doctrine Is Unacceptable To Most Members Of Society

The constitutional doctrine of abortion privacy spawned by *Roe* is at least partially unacceptable to most members of society. And the abortion doctrine is *strongly* opposed by a significant minority of the American public.

Consider the following data: First, when the Supreme Court decided *Roe*, legislation restricting abortion was already in effect in *all* the states and territories. In fact, in two-thirds of the

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46. *See* Moore, *Moral Sentiment in Judicial Opinions on Abortion*, 15 SANTA CLARA LAW. 591, 633 (1975); Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2 (1973).

47. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 27-29 (1975); A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 53, 113 (1976).

48. The "abortion decisions" of the United States Supreme Court include the following: Harris v. McRae, 100 S. Ct. 2671 (1980); Bellotti v. Baird, 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

states only "lifesaving" or "health preserving" abortions were legally permissible. The laws of these states were effectively invalidated by *Roe*. Another thirteen states had recently liberalized their abortion laws and adopted the provisions of the Model Penal Code. Those provisions also were effectively declared to be unconstitutional in *Doe*. Even the most liberal abortion laws then in effect, which permitted abortion-on-demand during part of the period of pregnancy, were unconstitutionally restrictive under the doctrine of abortion privacy.[49]

By itself, the invalidation of all existing abortion laws might not necessarily suggest that the abortion decisions were unacceptable to a majority of Americans. After all, as conceded earlier, there was disparity between the pre-*Roe* abortion laws and public morality. But during the five or six years before *Roe* virtually (if not literally) *every* state considered modification of its existing abortion laws—and about one-third revised them. This did not occur secretly. There was tremendous public interest and political debate about abortion reform. In light of the attention that had been devoted to the issue, and the changes that had been made through the political processes prior to 1973, the effect of *Roe* to invalidate *all* of the laws does suggest that *Roe* went beyond the contemporary moral order.

Second, ever since *Roe* was decided, state legislatures have been extremely active in adopting legislation attempting to reinstate abortion restrictions. The same year the Supreme Court decided *Roe* and *Doe,* thirty-nine different abortion bills responding to those decisions were passed by various state legislatures.[50] Six years later, in 1979, another forty-one new abortion laws were enacted by state legislatures.[51] And in the seven years since *Roe* was decided, one-half of all fertility related legislation has concerned abortion. From 1973 through 1979, a total of 176 separate abortion bills were enacted into law by state legislatures.[52]

Third, public attitudes about abortion have remained *virtually constant* for the last eight years. A majority of Americans disagree, *at least in part,* with the abortion-on-demand rule established by the Supreme Court decisions.[53] One survey compar-

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49. *See* text at note 46 *supra.*

50. *See* 9 FAM. PLAN. & POPULATION REP. 15 (1980).

51. *Id.*

52. *Id.*

53. *See* N.Y. Times, Apr. 22, 1979, at 49, col. 1; Washington Post, Aug. 27, 1980,

ing attitudes between 1972 and 1976 about permitting abortions for six different reasons found that the percentage of Americans who approved of abortion had risen by an average of only four percent in each of the six categories.[54] (Although a large majority of those polled agreed that abortion should be legal in the cases of serious danger to maternal health, rape, and when there is a likelihood of serious defect in the baby, only one-half (forty-seven to fifty-four percent) agreed in 1976 that abortions should be allowed for economic reasons, to avoid a stigma of unwed motherhood, or to limit family size. In fact, the approval rates for the abortion for the last four reasons have all fallen since the 1973-1974 period of peak abortion approval.[55]

Of even greater interest, the Gallup Poll has evaluated public opinion on a standard set of questions every year since the Supreme Court decisions were rendered. The results for 1980 revealed that approximately twenty-five percent of the adults questioned favored abortion-on-demand, approximately fifty-five percent opposed abortion-on-demand but favored legalized abortions in only certain circumstances, and about twenty percent of all adults polled would allow no legalized abortion except when necessary to save maternal life.[56] These figures are *almost the same* (only four percent variation) as they were in 1973, the year *Roe* was decided.[57] Thus, there has been no statistically significant change in the public attitude about abortion since the Supreme Court decisions. Even though significant minorities strongly endorse or oppose the Supreme Court decisions *in toto*, a large majority disagree with at least the most crucial element of the abortion doctrine, *i.e.*, abortion-on-demand.

Finally, the most important index of moral order regarding political or social issues within society at any given time is probably the ballot box. Although the political process is very complex, and election results can easily be misinterpreted, the impact of abortion as an election issue cannot be ignored. In 1978, six United States Senators were targeted for defeat by a right-to-life political action group, and all six were defeated. This included the stunning defeat of Senator Richard Clark of Iowa,

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§ A, at 16, col. 1.

54. Tedrow & Mahoney, *Trends in Attitudes Toward Abortion: 1972-1976*, 43 PUB. OPINION. Q. 181, 183 (1979).

55. *Id.* at 183 (Table 1).

56. Washington Post, Aug. 27, 1980, § A, at 16, col. 1.

57. *See* N.Y. Times, Apr. 22, 1979, at 49, col. 1.

and a "clean sweep" by pro-life candidates in the major political races in Minnesota.[58] In the 1980 primaries, Ronald Reagan's pro-life position was one of the factors identified as contributing to his sweep to victory, and that year the Republican Party became the first major American political party to call for a constitutional amendment for the purpose of reversing *Roe* as part of the official party platform.[59] (The stunning victory nationwide of conservative, anti-abortion candidates in the 1980 general election[60] also may evidence public dissatisfaction with the abortion doctrine.)

Therefore, the judically created doctrine of abortion privacy is probably unacceptable, at least in part, to a large majority of the American public. However, *this does not address the critical question about legitimacy.* The first tolerance limit on judicial activism focuses on the other side of the issue—whether or not the judical decision is *supported* by an active and influential group in society. And the same statistics that show that the abortion doctrine is at least partially unacceptable to most Americans also reveal that it is strongly favored by a large minority (approximately twenty-five percent) of the American public, and that it is at least acceptable *in part* to the vast majority of the public.[61] Similarly, such large and influential groups as the Planned Parenthood Federation of America and the American Civil Liberties Union, not to mention such smaller and more partisan groups as the National Abortion Rights Action League, have been extremely active in supporting the pro-abortion decisions of the Supreme Court.[62] Thus, although the abortion decisions appear to be at least somewhat inconsistent with the moral attitudes of most Americans, it does *not* appear that the abortion decisions have failed this standard of legitimacy because they have been vigorously supported by an active and influential group within society. As these pro-abortion groups have succeeded to date in at least offsetting the influence that the anti-

58. *See, e.g.,* Golden, *Abortion's Morning After,* N.Y. Times, Dec. 4, 1978, § A, at 20. *See also* National Right to Life News, 11 (Dec. 1978); National Abortion Rights Action League Newsletter, 1 (Dec. 1978).

59. 38 CONG. Q. WEEKLY REP. 2034 (1980).

60. *See* National Right to Life News, (Nov. 10, 1980) (entire issue).

61. *See* notes 53-57 and accompanying text *supra.*

62. One need only look at the organizations that have been active as litigants or amici curiae in the abortion cases to find evidence abundant that many influential organizations have actively supported—and aggressively encouraged expanding—the *Roe* doctrine of abortion privacy.

abortion groups have exerted upon strategically-placed decision-makers within society, it would appear that the abortion decisions must be acknowledged to be legitimate on this basis.

B. The Supreme Court Has Exceeded Its Proper Institutional Role In The Abortion Cases

Not since the Supreme Court abandoned economic due process forty years ago has it been so widely criticized for engaging in "social legislation" under the guise of interpreting the Constitution as it has for the abortion decisions. The abortion decisions were immediately and severely criticized by prestigious constitutional scholars for their resurrection of substantive due process.[63] Prominent among these attacks have been the criticisms of commentators who favor liberalized abortion laws. For example, in his acclaimed Yale Law Journal article condemning the Court "not so much [because] it bungles the question it sets itself, but rather [because] it sets itself a question the Constitution has not made the Court's business,"[64] Professor John Hart Ely paused to note, "Were I a legislator I would vote for a statute very much like the one the Court ends up drafting."[65] Likewise, Alexander Bickel looked beyond his apparent personal sympathy for the abortion policy the Court adopted, and criticized the Court for violating the institutional restraints on judicial action. He asked, "Should not the question then have been left to the political process, which in state after state can achieve not one but many accomodations, adjusting them from time to time as attitudes change?"[66]

Other judges, including other federal judges, have criticized the Court for exceeding its jurisdiction in deciding the abortion cases. In response to the survey of a political science professor in 1975 and 1976, 165 federal judges and eighty-four state court judges expressed their discomfort with the abortion decisions. "Many judges in both samples labeled *Roe v. Wade* massive 'judicial legislation'."[67] Indeed, the rigid, formalistic, non-analytical application of *stare decisis* in so many of the early, post-*Roe*,

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63. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment On* Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

64. Ely, *supra* note 63, at 943.

65. *Id.* at 926.

66. A. BICKEL, *supra* note 47, at 28.

67. Caldeira, *Judges Judge The Supreme Court*, 61 JUDICATURE 208, 212 (1977).

abortion decisions of the lower federal courts may have resulted in part from the perception of federal judges that on this issue the Supreme Court had really overdone it, and that the only way the independence of the judiciary as an institution could be preserved in the face of widespread criticism would be by "closing ranks" on the issue.[68]

At one time the argument was profferred that it was necessary for the Supreme Court to try to resolve the abortion controversy because the political processes were frozen and legislators were "trapped" because the heavy "religious" overtones of the abortion controversy prevented the political system from being responsive to the desires of the citizenry for liberalized abortion legislation.[69] This argument has now been abandoned by even its chief proponent.[70] And it is just as well, for this theory simply could not stand up under the facts. Pregnant women and others who favored abortion liberalization were not denied the right to register to vote. They were not kept away from the polls by armed mobs. They were not barred from lobbying in the halls of legislatures. Nor were their efforts doomed to futility because of intrinsic inequities in the political system. Quite the contrary: Register, vote, and lobby they did—with *extraordinary* success. In light of the facts that one-third of the states adopted significantly liberalized abortion laws in the six-year span between 1967 and 1972, and that abortion liberalization was achieved through both legislative enactment and popular referenda, it is absurd to assert that judicial action was "necessary" in 1973 because the political process was "frozen" by religious entanglement; that state legislators were "trapped;" or that the rights of a discrete and insular minority needed to be protected by an impartial and neutral judiciary.

Thus, it could easily be said that the Supreme Court exceeded its institutional limits when it "legislated" the abortion decisions. But again, this *fails to address the critical issue* of whether or not the abortion decisions have been perceived by one of the co-equal branches of government as threatening their institutional authority. And on this specific point, it appears that the abortion decisions are quite safe—at least for the time being. In the first place, the abortion debate was (and still is) so

68. *See* L. WARDLE, *supra* note 44, at 303.
69. Tribe, *supra* note 46, at 18-25.
70. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 928 (1978).

deeply controversial that, in the words of one distinguished scholar, when the Supreme Court in 1973 stepped in and assumed responsibility for deciding the issue "[t]he sighs of relief as this particular albatross was cut from the legislative and executive necks seemed to me audible."[71]

The action, or inaction, of the Congress and the President since these Supreme Court decisions were rendered reaffirms this assumption. Indeed, while Congress has solemnly listened to a small army of witnesses complaining about the abortion decisions, and while numerous resolutions and dozens of bills have been introduced calling for actions ranging all the way to constitutional amendments, *virtually no legislative response has emerged* since 1976 except for the amendments to the annual appropriations bills which limited public funding of abortions.

The dispute over public funding of abortions comes much closer to the precipice. After all, the Constitution specifically gives to Congress the power over the federal purse.[72] Thus, the decisions of the Supreme Court in the 1977 abortion funding cases, upholding the power of Congress to prohibit the public funding of elective abortions,[73] avoided a possible confrontation with Congress on this point. And the 1980 public funding decisions,[74] in which the Supreme Court upheld the power of Congress even to refuse to subsidize certain "medically necessary" abortions (*i.e.*, abortions which are recommended for medical reasons, but which are not necessary to save the life of the mother), also avoided any appearance of a judicial usurpation of congressional authority. Inasmuch as 238 members of Congress (including more than a majority of the members of the House of Representatives) filed an amicus curiae brief with the Supreme Court in the 1980 Hyde Amendment case urging the Court not to interfere with the operation of the Hyde Amendment, and arguing that Congress—not the Court—had the constitutional duty to determine fiscal matters, including the extent of public funding of abortions,[75] the Court's decision upholding the Hyde Amendment avoided a sure confrontation on this point.

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71. Ely, *supra* note 63, at 947.

72. U.S. CONST. art. I, § 7(1), § 8(1).

73. Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

74. Williams v. Zbaraz, 100 S. Ct. 2694 (1980); Harris v. McRae, 100 S. Ct. 2671 (1980).

75. Brief Amicus Curiae of Rep. Jim Wright, et. al., Harris v. McRae, 100 S. Ct. 2671 (1980).

Thus, from 1973 to 1980 the Supreme Court apparently avoided creating the perception among the coordinate branches of government that it has usurped their powers. And even though the Court probably has exceeded its judicial function (as a matter of scholarly observation), so long as the members of Congress and the President do not consider the Supreme Court abortion decision to deprive them of any of their authority to deal with politically *desirable* issues, the abortion decisions will retain legitimacy on this point.[76]

C. The Opinions Of The Court In The Abortion Cases Are Not Credible

Only on this point does it appear that the abortion decisions have already fallen below the standard of legitimacy for judicial activism. The Supreme Court opinions in the abortion cases are so poorly reasoned that they fall below minimum standards of acceptable legal analysis. In another context, inadequate legal analysis in a Court opinion might be less important. But on an issue that is so controversial, the failure of the Court to provide a credible justification for its action is a grievous shortcoming.

The opinions of the Court in *Roe* and *Doe* have been condemned almost unanimously by legal scholars. *Roe* has been criticized for the inadequacy of the "facts" on which it was based,[77] for the inadequacy of its consideration of vital constitutional concerns,[78] for its resurrection of substantive due process,[79] for its absence of any "principled" analysis,[80] and for its attempt to judicially mandate an absolute solution to a complex

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76. However, if a Congress is elected that views the abortion decisions as an intolerable usurpation of legislative authority, or if the Supreme Court's decision in some future abortion case is so intransigent or doctrinaire as to create the fear that the Court intends to exceed an acceptable degree of infringement on the legislative function, the legitimacy of the abortion decisions on this point could quickly vanish.

77. *See, e.g.*, Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORD. L. REV. 807 (1973); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975); Witherspoon, *Impact of the Abortion Decisions Upon the Father's Role*, 35 JUR. 32, 41-47 (1975).

78. *See, e.g.*, A. COX, *supra* note 47, at 53; Destro, *supra* note 77, at 1250-61; Ely, *supra* note 63, at 923-26.

79. *See, e.g.*, Ely, *supra* note 63, at 937-43; Epstein, *supra* note 63, at 159. *See also* R. BERGER, GOVERNMENT BY JUDICIARY 249-347 (1977); Tribe, *supra* note 46, at 2.

80. *See, e.g.*, A. BICKEL, *supra* note 47, at 27-29; Tribe, *supra* note 46, at 7; Ely, *supra* note 63, at 943-47; J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 630-31 (1978). *See also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 123-30 (1977).

political controversy.[81]

Professor Bickel chastised the High Court for ruling by judicial fiat and for failing to explain its reasoning: "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject. It simply asserted the result it reached."[82] Professor Ely wrote: "At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, *but never before has its sense of an obligation to draw one been so obviously lacking.*"[83] He further observed: "*Roe* lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine . . . ."[84] Professor Ely concluded his stinging analysis of *Roe* by observing that it "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[85]

Professor Epstein commented that the Supreme Court's rationale for its abortion decisions was so poor that "[w]hat seemed to make sense as a matter of principle to a lot of people and a lot of lawyers is all of the sudden suspect."[86] Professor Cox summarized the criticisms well when he wrote:

> My criticism of *Roe v. Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of specific abstractness to lift the ruling above the level of political judgment . . . . Constitutional rights ought not to be created under the Due Process Clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.[87]

Federal and state judges, surveyed three years after the abortion decisions were announced, criticized the decisions for the same reasons. "For these judges, the justices' opinions on abortion in *Roe* lacked sufficient reasoning to justify this judicial

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81. *See, e.g.*, A. BICKEL, *supra* note 47, at 27-29; Destro, *supra* note 77, at 1259-60; Epstein, *supra* note 63, at 183-86. *See also* L. WARDLE, *supra* note 44 (Introduction).

82. A. BICKEL, *supra* note 47, at 28.

83. Ely, *supra* note 63, at 936-37 (emphasis added).

84. *Id.* at 943.

85. *Id.* at 947 (emphasis in original).

86. Epstein, *supra* note 63, at 179.

87. A. Cox, *supra* note 47, at 113-114.

excursion into the field of morals."[88]

Clearly, then, the abortion opinions do not adequately justify the results reached. As examples of judicial craftsmanship, the *Roe* and *Doe* opinions are an embarrassment to the profession. Unquestionably, the abortion decisions lack legitimacy on this point.

This defect, alone, probably does not render the legal rules established by the abortion decisions illegitimate. After all, the quality of legal analysis is not a matter of first importance for many persons outside legal circles. And, it must be admitted, that even the most well-written and credibly analyzed opinion dealing with such a controversial issue would incur the criticism of activists favoring the losing side.

But the language of the law is not without significance. And the language of the abortion decisions fails to motivate, or even justify. When one considers the abortion doctrine and asks "why," these cases do not provide a satisfying answer. There is an emptiness here, a lack of principle and reason. When one reads the abortion cases, one has the uneasy feeling that someday (perhaps soon) *Roe* and its progeny will come back to haunt a new generation of Americans as did the Court's opinions in *Dred Scott v. Sanford*,[89] and *Plessy v. Ferguson*.[90]

D. The Legitimacy of The Abortion Decisions

What does application of the model of tolerance limits reveal about the abortion decisions? It provides a tentative conclusion that the abortion decisions are currently "legitimate"—so far as that term has been used in this paper to mean compatibility with contemporary social mores, or being within the "gravitational field" surrounding the core moral order of society. Inasmuch as the abortion decisions are strongly supported by a politically active minority in society (and are acceptable, in part, to a substantial majority), and inasmuch as the political branches of government do not now perceive any threat to their authority, the judicially created doctrine of abortion privacy passes the test of "legitimacy" in the context of the "gap" between the law and moral order in society. The fact that the abortion decisions do not contain credible, much less persuasive,

88. Caldeira, *supra* note 67, at 212.
89. 60 U.S. (19 How.) 393 (1857).
90. 163 U.S. 537 (1896).

reasoning impairs the legitimacy of the abortion doctrine. The Court's prestige and reputation probably have suffered, and perhaps we will see a more cautious judiciary in other cases in the future. But the new law—the abortion doctrine—is substantially legitimate, if only temporarily so.

The continuing abortion controversy underscores the fact that law in a diverse, dynamic, politically responsive society is always susceptible to change. Because a law-change is legitimate does not suggest that it will be permanent. The abortion issue still is very controversial; it may be *the* civil rights issue of the 1980's. While the doctrine of abortion privacy is legitimate now, it may not be so in five years.

IV. Conclusion

The gap between the law and moral order of society is the birthplace of political discontent. Because a judicially created gap develops without the benefit of democratic participation, it poses a special risk for exceeding the tolerance limits of society. It also may constitute a threat to the legitimacy of the judiciary as an institution. Therefore, it would be valuable to be able to evaluate the legitimacy of the "gap" created by judicial activism.

I have proposed three tolerance limits for measuring judicial activism: (1) The law-change must be supported by a politically active and influential group in society; (2) it must not be perceived by other branches of government as usurping their powers; and (3) the articulated rationale for the law-change must be credible. Applying these standards to a recent product of judicial activism, the abortion decisions, no major flaws in my model are revealed. It also appears that the abortion doctrine passes the first two tests, but fails the third. I would conclude that the judicially created doctrine of abortion privacy presently is legitimate, notwithstanding the inadequacy of the Supreme Court's opinions, but that the judiciary (or, at least, judicial activism) has suffered some loss of prestige, and the controversy continues.

The remaining, difficult question is whether I have overlooked an essential element. Is there not a fourth factor required—a morality *per se* element? To be legitimate must not a law or rule of law be moral in a larger sense than merely being compatible with contemporary social attitudes? Are not some values so fundamental that if they are negated by a law, however popular it may be, that law is not legitimate? If so, what are

these values? How are these values to be identified? Who in our society identifies them? In the abortion context, should the "moral belief—acting to save life" defense be accepted as a valid exculpating defense in cases where pro-life protestors are prosecuted for blocking access to abortion clinics?

My failure to address these intriguing questions does not result from a failure to appreciate that they have been asked and must be considered. As my colleagues can readily attest, I hold a very strong opinion about the morality of abortion: I believe that it is a terribly immoral and cruel practice, fundamentally inconsistent with the very notion of law; it is the ultimate form of invidious discrimination against the ultimately defenseless class. But in this paper I have deliberately avoided addressing the philosophical issue of rightness or wrongness. The scope of my inquiry has been much more modest. I have attempted to examine the *legitimacy* of law, not the critical morality of it.

My approach is largely a result of my respect for the works of such luminaries as H.L.A. Hart,[91] Lon Fuller,[92] and John Noonan,[93] and the belief that I can add little to what they have already said. It is also the result of my conviction that the most important values in any system of secular law are procedural (what Professor Fuller called the "inner morality of law"), and that in a democracy one of the most fundamental of these is the value of public participation in the formulation of substantive laws.

Finally, I have focused on the legitimacy of the abortion privacy doctrine, in part, because of comments some of my anti-abortion friends have made suggesting that the abortion decisions are so immoral that they are not legitimate and need not be obeyed. As both a supporter of our legal order system and a critic of *Roe v. Wade,* I am convinced that it would be tragic for anti-abortionists to adopt a policy of confrontation and civil disobedience because of an erroneous belief that the abortion decisions are not legitimate. While I agree that the abortion privacy doctrine is an immoral rule of law which, if perpetuated in its present form, could lead to an unprecedented American holo-

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91. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593 (1958).

92. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 HARV. L. REV. 630 (1958).

93. J. NOONAN, THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (1970).

caust of both physical and spiritual dimensions, I also believe that there still exist many methods by which this judicial doctrine can be opposed and overturned without defying the law. And to wantonly defy a legitimate law while established avenues of redress are open would weaken our whole system of law and jeopardize those very processes which historically have functioned successfully (if slowly) to repudiate immoral laws and preserve a democratic legal order.